

APPEAL NO. 93504

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1993). On May 27, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant), who is the wife of decedent, KW, is entitled to no benefits under the 1989 Act because the decedent was covered by the Longshore and Harbor Workers' Compensation Act (Longshoreman's Act) and was also exempted from coverage by Article 8308-3.10 of the 1989 Act. Claimant asserts that the Longshoreman's Act is not exclusive, and decedent had significant contacts with Texas under Article 8308-3.15 of the 1989 Act (although hired for the job at which he died in Portland, Oregon, the hiring contemplated that he would work in Texas upon completing limited tasks in Oregon).

DECISION

We affirm.

At the hearing the parties agreed that the issues were whether the claimant was subject to the exclusive remedy found in the Longshoreman's Act and whether her deceased husband had "significant" contacts with Texas.

Article 8308-6.43(c) of the 1989 Act states that the Appeals Panel "shall determine each issue on which review was requested."

The Appeals Panel determines:

That the Longshore and Harbor Workers' Compensation Act, 33 USCA § 901, *et seq.*, applied to claimant's husband at the time of his death and provides the exclusive remedy as to liability of the employer; in addition, the 1989 Act exempts claimant's husband from the 1989 Act since he was covered by a federal compensation law.

That the question of whether claimant's husband had significant contacts with Texas is moot since he was not covered by the 1989 Act through the application of the exclusivity clause of the Longshoreman's Act and/or the exempt clause of the 1989 Act.

Claimant's husband worked as a rigger (ropewalker) on ships. His profession called for him to hang cables from the masts of ships, which could be from 60 to 90 feet high. On (date of injury), he fell and was killed while working. The hearing officer's finding that death occurred while decedent was doing maintenance work on the Keystone Canyon in the shipyard at Swan Island, Portland, Oregon, was not challenged.

Claimant and her husband left G in June 1991, to go to Oregon where the husband would work for (employer). The husband worked for that employer until July 26, 1992, when he left to accept employment elsewhere. While living in Oregon, he was then called

by employer in September, 1992 to see if he wished to return to work for employer. He did return to work for employer in September 1992 and on (date of injury), he had his accident. Claimant's wife testified that she has received checks under the Longshoreman's Act since his death but has not cashed them.

The hearing officer states in her decision that there was no controversy regarding the facts of the case; the record and the appeal are consistent with that statement. (GP) was called by the carrier; he testified that the ship on which claimant's husband worked was in the water at the time, that it was not recreational, and that it was over 18 tons.

The Longshore and Harbor Workers' Compensation Act (Title 33) provides at section 902 that employees covered by that act include "ship repairmen." At section 904, liability is imposed upon employers. Section 905 then makes "liability of an employer . . . exclusive" and also says that it is "in place of all other liability." Section 909 addresses death benefits. The carrier cited Southern Pacific Co. v. Jensen, 244 U.S. 205, 61 L. Ed. 1086, 37 S. Ct 524 (1917) which stated that the states may not contravene the essential purposes of an Act of Congress. In Sea Land Services v. Dir., Office of Wkrs. Comp. Etc., 540 F2 629 (3d Cir. 1976), Jensen, *supra*, was cited as saying that state workers' compensation laws are not allowed to intrude on the navigable waters of the United States. The court in Sea Land then emphasized the special relationship, not the situs, as the key to exclusiveness, calling the line to be drawn "functional," not "spatial."

On appeal, claimant merely addresses the Longshoreman's Act by stating that it is not the exclusive remedy; at the hearing, claimant argued that Article 8308-3.10 of the 1989 Act, which exempts employees covered by federal law compensation, is unconstitutional. Since this argument is not made on appeal, it will not be addressed herein.

The facts of this case support the determination that the Longshoreman's Act covered claimant's husband's employment at the time of his death. That Act does provide an exclusive remedy. There was no evidence provided that claimant's husband in some manner came within any exception to that Act. In addition, the 1989 Act specifically exempts coverage of employees covered by federal law, such as the Longshoreman's Act, so it applies to this case and also denies coverage.

Article 8308-3.15 of the 1989 Act addresses significant contacts which an employee may have with Texas. These contacts can result in the employee being covered by the 1989 Act just as if the injury occurred within Texas. There is nothing in this section that would expand coverage to include anything not covered if the employee were in Texas at the time. We observe that had claimant's husband been working along the Texas coast on the Keystone Canyon under conditions similar to those in which he worked in Oregon, the Longshoreman's Act and Article 8308-3.10 of the 1989 Act would still apply and provide no recovery under the 1989 Act. For that reason the issue of significant contact is moot; but

we also observe that the facts show claimant left Texas in June 1991 so that he was out of the state over a year when he died; in July 1992, he voluntarily left the job that he had when he departed Texas; and he then joined this employer in September 1992, while living in Oregon. If it were necessary to determine the applicability of Article 8308-3.15 to this case, we would find that the evidence is sufficient to uphold the determination of the hearing officer that claimant's husband did not have significant contacts with Texas at the time of his death.

The decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge